(3)

No. 91-990

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DALE FARRAR, *et al.*,

Petitioners,

v.

WILLIAM HOBBY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

TALBOT S. D'ALEMBERTE*
President
American Bar Association
ERIC B. SCHNURER
CARTER G. PHILLIPS
JOSEPH R. GUERRA
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-5215

Counsel for Amicus Curiae

**Counsel of Record*

April 9, 1992

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-990

DALE FARRAR, *et al.*,

Petitioners,

v.

WILLIAM HOBBY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

---

MOTION OF THE AMERICAN BAR ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The American Bar Association ("ABA") hereby requests, pursuant to Rule 37 of the Rules of this Court, leave to file the accompanying brief as *amicus curiae* in support of petitioners. The ABA obtained the consent of the petitioners to the filing of this brief.[1] Counsel for respondent, however, refused to grant consent.

The ABA is the leading national membership organization of the legal profession, numbering more

---

[1] A letter of consent from petitioners has been lodged with the Clerk of the Court.

than 365,000 members throughout the United States. The ABA's membership includes many lawyers who regularly represent plaintiffs in civil rights, antitrust, environmental, and other types of federal litigation in which, by federal statute, courts are empowered to award "reasonable attorney's fees" to prevailing parties.

As the national organization of the bar, the ABA has long promulgated standards of professional responsibility, including standards governing the fees that attorneys may charge for their services. The ABA also has recognized the legal profession's duty to help enforce our nation's civil rights laws. The ABA has contributed to the development of federal fee-shifting statutes, and, in light of its leadership role, has participated as *amicus curiae* in previous cases before this Court concerning the interpretation of these statutes.[2]

The practical interest of the ABA's members in the proper application of fee-shifting statutes, the commitment of the ABA and its members to the development of proper ethical standards for attorney service and compensation, and the commitment of the ABA and its members to the protection of constitutional norms give the ABA a strong and unique interest in this case as *amicus curiae*. The ABA believes that its perspective on the issues presented by petitioners will assist the Court in evaluating the decision of the court of appeals.

---

[2] See *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987). The ABA also is filing a brief as *amicus curiae* in *City of Burlington* v. *Dague*, No. 91-810.

For the foregoing reasons, the ABA's Motion for Leave to File a Brief as *Amicus Curiae* in Support of Petitioners should be granted.

Respectfully submitted,

TALBOT S. D'ALEMBERTE*
President
American Bar Association
ERIC B. SCHNURER
CARTER G. PHILLIPS
JOSEPH R. GUERRA
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-5215
Counsel for Amicus Curiae

**Counsel of Record*

QUESTION PRESENTED

Whether 42 U.S.C. § 1988 authorizes the award of reasonable attorney's fees to civil rights plaintiffs who recover nominal damages.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-990

DALE FARRAR, *et al.*,

Petitioners,

v.

WILLIAM HOBBY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

---

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The interest of the American Bar Association as *amicus curiae* is fully set forth in the Motion for Leave to File a Brief as *Amicus Curiae* in Support of Petitioners.

SUMMARY OF ARGUMENT

Congress enacted 42 U.S.C. § 1988 to enable plaintiffs to vindicate the fundamental national policies underlying the civil rights laws. "[U]nless rea-

sonable attorney's fees could be awarded for bringing these actions, Congress found that many legitimate claims would not be redressed." *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 560 (1986). This is because "a vast majority of the victims of civil rights violations cannot afford legal counsel" and because many civil rights claims have a "severely limit[ed]" potential for damages. H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1, 9 (1976). Indeed, consistent with this congressional policy, this Court has recognized "the importance to organized society" of prosecuting civil rights actions even where the victim of a constitutional violation has suffered no "actual injury" apart from the denial of a constitutional right and where, as a consequence, the only damages recoverable are nominal. See *Carey* v. *Piphus*, 435 U.S. 247, 266 (1978). Thus, an explicit rationale of Section 1988 was the need to provide an incentive for the prosecution of civil rights actions that were likely to result in little or no damage recoveries for the plaintiff.

Given the recognition by Congress and by this Court that lawsuits brought to vindicate constitutional rights serve a vital public purpose even when they do not yield significant damage recoveries, there is clearly no basis upon which to hold that a plaintiff who succeeds in such an action is not a "prevailing party" because his damages are only nominal. Time and again, this Court has made clear that Section 1988's "prevailing party" requirement entails only a minimal "threshold" inquiry, and that a party may be said to have "prevail[ed]" where he "has succeeded on 'any significant issue'" presented in the litigation, *Texas State Teachers Ass'n* v. *Garland Indep. Sch. Dist.*,

489 U.S. 782, 791 (1989), and where, as a result, he "receive[s] at least some of the relief on the merits of his claim." *Hewitt* v. *Helms*, 482 U.S. 755, 760 (1987). Once this test is met, "the degree of the plaintiff's overall success goes [only] to the reasonableness of the award . . ., not to the availability of a fee award *vel non*." *Texas State Teachers*, 489 U.S. at 793.

The court below contravened this teaching by making the availability of a fee award in a civil rights action turn, not on whether the plaintiff in fact has succeeded in obtaining relief on the merits of his claim, but rather on the *degree* of the plaintiff's success as measured by the dollar value of the damages awarded. In so doing, the court of appeals extended dramatically this Court's rulings in *Rhodes* v. *Stewart*, 488 U.S. 1 (1988), and *Helms*, 482 U.S. 755, which had announced only the "common sense" proposition that a plaintiff cannot be said to have prevailed where he has obtained *no relief whatsoever* from the defendant.

The fact that petitioners recovered only one dollar out of the $17 million they requested should not prevent them from crossing the statutory threshold to a fee award of some kind. The magnitude of the recovery should be a factor solely in determining the amount of fees that ultimately are awarded. Although the degree of a plaintiff's success is not relevant to whether he is a "prevailing party," it is clearly relevant to determining what fee is "reasonable" under all the circumstances. See *Texas State Teachers*, 489 U.S. at 790; *Hensley* v. *Eckerhart*, 461 U.S. 424, 436 (1983). For this reason, it does not follow inexorably that simply because a plaintiff "prevails," even though

the success is limited, he or she will receive a large award of attorney's fees.

ARGUMENT

I. THE LANGUAGE, PURPOSE, AND HISTORY OF 42 U.S.C. § 1988 DEMONSTRATE CLEARLY THAT CONGRESS INTENDED THAT PREVAILING PLAINTIFFS, EVEN THOSE WHO RECOVER ONLY NOMINAL DAMAGES, ARE ENTITLED TO RECOVER REASONABLE FEE AWARDS.

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, provides in relevant part:

> In any action or proceeding to enforce a provision of sections [1981, 1982, 1983, 1985, and 1986 of this title], title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Congress enacted Section 1988 in response to this Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), which had "reaffirmed the 'American Rule' that each party in a lawsuit ordinarily shall bear its own attorney's fees unless there is express statutory authorization to the contrary." *Hensley*, 461 U.S. at 429.

Congress' swift response to *Alyeska* was grounded in the determination that civil rights plaintiffs too often were unable to secure legal representation in the private legal services market and that, as a result, violations of important federal rights went unredressed. "Because a vast majority of the victims of civil rights violations cannot afford legal counsel,"

Congress observed, "they are unable to present their cases to the courts." H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976). Moreover, "while damages are theoretically available under the statutes covered by [Section 1988], . . . immunity doctrines and special defenses, available only to public officials, [may] preclude or severely limit the damage remedy." *Id.* at 9. Consequently, as a general matter, "civil rights cases—unlike tort or antitrust cases—do not provide the prevailing plaintiff with a large recovery from which he can pay his lawyer." 122 Cong. Rec. 33,314 (1976) (remarks of Sen. Kennedy).

Fearful that these factors were causing many meritorious civil rights claims to go unprosecuted, Congress enacted Section 1988 "to ensure 'effective access to the judicial process' for persons with civil rights grievances." *Hensley*, 461 U.S. at 429 (quoting H.R. Rep. No. 1558, *supra*, at 1).[3] "[F]ee awards," the Senate report noted,

> have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain. . . . If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

---

[3] See also *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 560 (1986) ("unless reasonable attorney's fees could be awarded for bringing these actions, Congress found that many legitimate claims would not be redressed").

S. Rep. No. 1011, 94th Cong., 2d Sess. 2 ("Senate Report"), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5910 (indication of paragraph break omitted).[4]

Thus, Congress not only recognized that successful civil rights actions often would not end in sizable damage awards, but also emphasized that "awarding counsel fees to prevailing plaintiffs in such litigation is *particularly important* and necessary if Federal civil and constitutional rights are to be adequately protected." H.R. Rep. No. 1558, *supra*, at 9 (emphasis added).[5] Accordingly, "the amount of fees awarded . . . [should] not be reduced because the rights involved may be nonpecuniary in nature." Senate Report, *supra*, at 6, *reprinted in* 1976 U.S. Code Cong. & Admin. News at 5913.

Two years after Congress enacted Section 1988, this Court confirmed Congress' understanding that the rights at stake in litigation covered by the fee-shifting statute often would "be nonpecuniary in nature." In *Carey* v. *Piphus*, 435 U.S. 247 (1978), the

---

[4] This Court regularly has relied upon these legislative reports in discerning Congress' intent with respect to the fee-shifting provision contained in Section 1988, as well as those found in other federal statutes. See, *e.g.*, *Texas State Teachers Ass'n* v. *Garland Indep. Sch. Dist.*, 489 U.S. 782, 790 (1989); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 560; *City of Riverside* v. *Rivera*, 477 U.S. 561, 575-78 (1986) (plurality opinion); *Hensley* v. *Eckerhart*, 461 U.S. 424, 429-30 (1983); *Maher* v. *Gagne*, 448 U.S. 122, 129 (1980).

[5] See also *Rivera*, 477 U.S. at 577 ("Congress enacted § 1988 specifically to enable plaintiffs to enforce the civil rights laws even where the amount of damages at stake would not otherwise make it feasible for them to do so").

Court held that, absent proof of some "actual injury" resulting from the deprivation of a constitutional right, a plaintiff who prevails in asserting a constitutional violation is entitled only to nominal damages. "By making the deprivation of such rights actionable for nominal damages without proof of actual injury," the Court explained, "the law recognizes the importance to organized society that those rights be scrupulously observed . . .." *Id.* at 266.

Thus, this Court in *Carey*, like Congress before it, recognized that plaintiffs perform a service "importan[t] to organized society" when they vindicate their civil rights in court, even though their lawsuits may result in nothing more than an award of nominal damages. As the legislative history of Section 1988 makes clear, it was the prosecution of precisely this sort of lawsuit that Congress sought to encourage through the fee-shifting mechanism—lawsuits that, although not economically attractive from a lawyer's point of view, nonetheless "vindicate the important Congressional policies which these [civil rights] laws contain." Senate Report, *supra*, at 2, *reprinted in* 1976 U.S. Code Cong. & Admin. News at 5910. Plainly, a rule such as that applied by the court of appeals in this case—holding that a civil rights plaintiff who brings a damage action does not "prevail" unless the damages awarded are substantial—directly contravenes Congress' purpose in enacting Section 1988.

II. THIS COURT'S CASES MAKE CLEAR THAT A PLAINTIFF WHO RECOVERS NOMINAL DAMAGES IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES UNDER § 1988.

A. The "Prevailing Party" Requirement Is Only A "Threshold" Inquiry.

An essential predicate, of course, to any award of attorney's fees under Section 1988 is that the plaintiff must be a "prevailing party." But, as this Court has made clear, the burden a plaintiff must carry to cross this "statutory threshold" was never intended to be a heavy one. A party need not prevail on all or even most of the issues presented in a lawsuit. *Hensley*, 461 U.S. at 435 & n.11. Nor must a party prevail on the "central issue" at stake in the litigation or achieve the "primary relief sought." *Texas State Teachers Ass'n* v. *Garland Indep. Sch. Dist.*, 489 U.S. 782, 790-91 (1989). Rather, "[i]f the plaintiff has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit,' the plaintiff has crossed the threshold to a fee award of some kind." *Id.* at 791-92 (quoting *Nadeau* v. *Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)).[6]

At bottom, the inquiry is a pragmatic one. Thus, this Court has held that a plaintiff may be a "prevailing party" even where there has been no "judicial determination that the plaintiff's rights have been violated," so long as a settlement favorable to the plaintiff has been struck. *Maher* v. *Gagne*, 448 U.S.

---

[6] As the Court concluded in *Hensley*, 461 U.S. at 433:

> This is a generous formulation that brings the plaintiff only across the statutory threshold. It remains for the district court to determine what fee is "reasonable."

122, 129 (1980). On the other hand, a judicial determination that the plaintiff's rights have been violated, standing alone and without any possibility that the plaintiff will ever obtain any relief from the defendant, is insufficient to make the plaintiff a "prevailing party." See *Rhodes* v. *Stewart*, 488 U.S. 1 (1988); *Hewitt* v. *Helms*, 482 U.S. 755 (1987). Accordingly, a plaintiff does not "prevail" in litigation if he obtains only a judicial finding of unconstitutional conduct for which the defendants are immune from all liability, see *Helms*, *supra*, or if he obtains only a declaratory judgment that is unenforceable because the case was moot when judgment was entered, see *Stewart*, *supra*. The rationale for this result is that "[a]t the end of the rainbow lies not a judgment, but some action . . . by the defendant that the judgment produces—the payment of damages, or some specific performance, or the termination of some conduct." *Helms*, 482 U.S. at 761. In sum,

> [t]he touchstone of the prevailing party inquiry [is] . . . the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute. Where such a change has occurred, the degree of the plaintiff's overall success goes to the reasonableness of the award under *Hensley*, not to the availability of a fee award *vel non*.

Texas State Teachers, 489 U.S. at 792-93.

As this Court's cases make plain, what counts in determining whether a plaintiff has "prevailed" is whether the plaintiff has obtained a judgment that is both favorable, in the sense that it finds that the defendant has violated the plaintiff's civil rights, and

enforceable, in the sense that the defendant is not free to ignore it. As should also be plain, however, especially given the value Congress assigned in enacting Section 1988 to the vindication of "nonpecuniary" civil rights, a judgment need not result in any particular "degree" of relief once a violation has been found and remedied by some judicial action.

B. The Court Below Erred In Making The Plaintiffs' Status As "Prevailing Parties" Contingent Upon The Size Of The Damage Award They Obtained.

The petitioners in this case obtained an enforceable judgment holding the respondent liable in damages for the violation of petitioners' civil rights. Respondent is not free to ignore the jury's verdict or to treat it as merely advisory. Moreover, upon execution of the judgment, respondent will have paid over to the petitioners the court-ordered compensation for the constitutional violation he has been adjudged to have committed. The petitioners' lawsuit therefore not only succeeded in vindicating their constitutional rights, but also effected a "change[] [in] the legal relationship" between the parties, see *Texas State Teachers*, 489 U.S. at 792, and produced "some action . . . by the defendant"—namely, "the payment of damages." *Helms*, 482 U.S. at 761.

Nevertheless, the court of appeals in this case held that the petitioners did not qualify as "prevailing parties" under Section 1988 because the *amount* of the damages they received, compared to the amount of damages they sought, rendered their victory "merely . . . technical." *Estate of Farrar* v. *Cain*, 941 F.2d 1311, 1315-16 (5th Cir. 1991). That holding is squarely at odds with this Court's instruction that the prevailing-party requirement is satisfied where the

plaintiff "has succeeded on 'any significant issue'" in the litigation, *Texas State Teachers*, 489 U.S. at 791, and, as a result, has "receive[d] at least some relief on the merits of his claim," *Helms*, 482 U.S. at 760.[7] The rule also is inconsistent with this Court's holding that the prevailing-party requirement should not impose a heavy burden on a plaintiff.[8]

Indeed, the Fifth Circuit's rule in the instant case suffers from precisely the same defects that led this Court to reject the "central issue" test that the Fifth Circuit previously propounded to govern prevailing-

---

[7] Not surprisingly, the Fifth Circuit's decision is also at odds with the established rule in other circuits, which have recognized that the congressional purposes underlying Section 1988, as well as this Court's decisions interpreting the statute, compel the conclusion that a plaintiff "prevails" when he obtains a damage award—of any size—against the defendant. See, *e.g.*, *Ruggiero* v. *Krzeminski*, 928 F.2d 558, 564 (2d Cir. 1991); *Allen* v. *Higgins*, 902 F.2d 682, 684 (8th Cir. 1990); *Scofield* v. *City of Hillsborough*, 862 F.2d 759, 766 (9th Cir. 1988); *Nephew* v. *City of Aurora*, 830 F.2d 1547, 1553 n.2 (10th Cir. 1987) (*en banc*), *cert. denied*, 485 U.S. 976 (1988); *Garner* v. *Wal-Mart Stores, Inc.*, 807 F.2d 1536, 1539 (11th Cir. 1987); *Ganey* v. *Edwards*, 759 F.2d 337, 339-40 (4th Cir. 1985); *Skoda* v. *Fontani*, 646 F.2d 1193, 1194 (7th Cir. 1981) (*per curiam*); see also 1 M. Derfner & A. Wolf, *Court Ordered Attorney Fees* ¶ 8.03[2][a], at pp. 8-20 through 8-21 (rev. ed. 1991) ("[B]ecause a plaintiff prevails when he has obtained 'some relief,' a plaintiff prevails when he obtains less—even far less—than he sought, such as when he recovers only nominal damages") (footnote collecting cases omitted).

[8] In this regard, the prevailing-party requirement is similar to the injury-in-fact requirement in standing analysis: it is the *fact* of concrete injury, not any particular magnitude of injury, that is required to get a plaintiff across the threshold. See, *e.g.*, *United States* v. *Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973).

party status. In *Texas State Teachers*, this Court held that the Fifth Circuit's "central issue" test—under which a party would be considered "prevailing" only if it "prevailed on the central issue [in the case] by acquiring the primary relief sought"—was inconsistent with Section 1988 because it made the plaintiff's eligibility for a fee award turn on "the *degree* of the plaintiff's success" rather than on the simple *fact* of the plaintiff's success. *Texas State Teachers*, 489 U.S. at 790 (emphasis in original).

Moreover, this Court found the "central issue" test deficient because it rendered the award of fees contingent on the timing of the fee request. Thus, a plaintiff could receive an award of fees for the successful portions of its case prior to final judgment, but would not be entitled to fees for the same work if no application were made until after an ultimately adverse judgment on the litigation's "central issue." See *id.* at 790-91.

Finally, the Court found that the "central issue" test had little "to recommend it from the viewpoint of judicial administration" because "it asks a question which is almost impossible [for courts reliably] to answer." *Id.* at 791. In requiring that courts identify the "central issue" in any litigation or "the primary relief" sought in any given case, the Fifth Circuit's test forced courts to undertake an " 'excruciating[ly]' " difficult inquiry and made the ultimate availability of a fee award "depend largely on the mental state of the parties" in bringing the action, a matter "wholly irrelevant to the purposes behind the fee shifting provisions." *Id.*

The Fifth Circuit's "nominal damages" exception suffers from each of these same defects. Here, the

court of appeals held that a plaintiff who has won a judgment of liability against a defendant and an enforceable award of money damages nonetheless is not a "prevailing party" if the court perceives that the plaintiff's "singular objective" in bringing the action was financial and that the amount of recovery is sufficiently small to be "disappointing." This demands that courts perform precisely the type of inquiry the Court condemned in *Texas State Teachers*.

First, the Fifth Circuit's rule makes the availability of any fee award contingent upon "the degree of the plaintiff's success." Here, plaintiffs clearly have satisfied the requirement articulated in *Helms* and *Stewart*—*i.e.*, they have obtained an enforceable judgment that has produced action by the defendant's paying them damages. Yet, the Fifth Circuit now demands something more, *viz.*, that the *degree* or *magnitude* of the money award be sufficiently large to qualify, in the court's subjective judgment, as a victory. This Court, however, has made clear that this additional requirement is inappropriate: "[T]he *degree* of the plaintiff's success in relation to the other goals of the lawsuit is a factor critical to the determination of the size of a reasonable fee, *not* to eligibility for a fee award at all." *Texas State Teachers*, 489 U.S. at 790 (second emphasis added).

Second, the Fifth Circuit's rule would render the availability of a fee award potentially dependent "on the timing of a request for fees." *Id.* at 791. In bifurcated cases, in which juries assess liability and damages in separate proceedings, plaintiffs could recover awards of attorney's fees *pendente lite* before damage juries decide that only nominal damages are appropriate. Yet, these same plaintiffs could recover

no fee awards at all if their applications were delayed until final judgment. As the Court made clear in *Texas State Teachers*, this result could not have been what Congress intended in enacting Section 1988. See *id.* ("Congress cannot have meant 'prevailing party' status to depend entirely on the timing of a request for fees . . ."); cf. *Helms*, 482 U.S. at 762 ("There is no warrant for having status as a 'prevailing party' depend upon the essentially arbitrary order in which the district court . . . choose[s] to address issues").

Third, the Fifth Circuit's test "asks a question which is almost impossible to answer," *Texas State Teachers*, 489 U.S. at 791, requiring courts to assess whether a plaintiff's "singular object" is a lucrative award of money damages and whether the particular amount of damages awarded is sufficiently lucrative to qualify as more than a "technical" victory. As an initial matter, the latter inquiry involves impossible line-drawing exercises. If a $1 recovery can be disregarded for purposes of determining whether the party has obtained "meaningful" relief, what of a $50 recovery, or a $500 recovery?

Moreover, the initial inquiry required by the Fifth Circuit's rule—whether the essential purpose of the plaintiff's lawsuit was to obtain substantial damages—is fundamentally hopeless as a rule of decision. Suppose, for example, that the petitioners here never had claimed any "actual injury" apart from the denial of their constitutional rights and, accordingly, had confined the relief they sought to nominal damages. *Carey v. Piphus* recognizes—as did Congress itself in enacting Section 1988—that a plaintiff who has suffered no "actual injury" from a constitutional violation may nonetheless elect to sue for nominal damages

and, in doing so, will vindicate principles "importan[t] to organized society." See 435 U.S. at 266.[9] Had the petitioners so confined their allegations in this case, they would have obtained precisely what they sought and their victory could not be dismissed as "merely . . . technical." The result should be no different simply because they added to their complaint an allegation of "actual injury" and a claim for corresponding compensation that the jury ultimately rejected.

The court of appeals in this case has drawn precisely this distinction, making the plaintiff's entitlement to fees turn, in effect, upon its primary motivation in bringing suit. As with the "central issue" test, "[t]his question, the answer to which appears to depend largely on the mental state of the parties, is wholly irrelevant to the purposes behind the fee shifting provisions, and promises to mire district courts . . . in an inquiry which . . . [can rightly be] described as 'excruciating.'" *Texas State Teachers*, 489 U.S. at 791.[10]

---

[9] Indeed, in such actions, this Court has recognized that "the potential liability of . . . defendants for attorney's fees" under Section 1988 itself serves as a valuable deterrent to constitutional violations. See *Carey*, 435 U.S. at 257 n.11.

[10] Any inquiry into motivation is inherently difficult, but the problem seems unusually intractable when the question is the motivation for litigation. There is at least a serious question about whose motivation the Court is reviewing—the attorney's or the plaintiff's. It is far from clear that they will have a common motivation. In one case, a plaintiff may wish to sue to vindicate his rights, while the lawyer may bring the action in the hope of winning a damage award from which he may obtain his fee. In another case, the litigant may care nothing about the constitutional issue, but the attorney may be far more con-

In sum, in holding that judges may deny "prevailing party" status to a plaintiff who has vindicated his constitutional rights and obtained in court an enforceable judgment for monetary relief, based solely upon the *size* of the damage award, the court of appeals has extended the rationales of *Helms* and *Stewart* well beyond their "common sense" moorings. If upheld, this ruling will thrust the courts into a sensitive area of decisionmaking in which there are few guideposts to channel judicial discretion. A hard-and-fast rule denying attorney's fees to civil rights plaintiffs who obtain a judgment only for nominal damages would fly in the face of Congress' intent in enacting Section 1988—*i.e.*, to enable the prosecution of lawsuits to vindicate rights that, although vitally important, "may be nonpecuniary in nature." A more flexible rule—for example, one that permits fee awards in nominal-damage actions involving some "genuine" struggle over constitutional principles but denies them in cases where a plaintiff's primary motivation in bringing suit is thought to be pecuniary[11]—would call upon the courts to make impossible judgment calls. There are no reliable standards by which to assess the "essen-

cerned with that aspect of the case. It would be almost impossible in a single set of pleadings for a court to discern what the plaintiff's real motivation is in pursuing a particular case because there is no way to know whose motive—litigant's or lawyer's—is revealed in the submissions involved in the litigation.

[11] This appears to be the rule applied by the court of appeals:

> [W]e hold that when the sole object of a suit is to recover money damages, the recovery of one dollar is no victory under § 1988. This was no struggle over constitutional principles. It was a damage suit and surely so since plaintiffs sought nothing more.

Estate of Farrar v. *Cain*, 941 F.2d 1311, 1315 (5th Cir. 1991).

tial" purpose of a lawsuit or the minimum money judgment necessary to render a legal victory "real" rather than "merely . . . technical." Accordingly, the ruling of the court of appeals in this case departs without justification from Congress' intention in Section 1988 to make legal counsel available even to those civil rights plaintiffs whose claims, although meritorious, "may be nonpecuniary in nature."

C. The Limited Nature Of A Prevailing Party's Success Is Properly Reflected In The Amount Of Attorney's Fees Awarded.

The fact that petitioners recovered only one dollar out of the $17 million they requested should not prevent them from crossing the statutory threshold to a fee award of some kind, but rather should be reflected in the amount of fees they ultimately recover. As this Court has explained, in complex civil rights litigation,

> [a]lthough the plaintiff often may succeed in identifying some unlawful practices or conditions, the range of possible success is vast. That the plaintiff is a "prevailing party" therefore may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved.

Hensley, 461 U.S. at 436. Accordingly, "the *degree* of the plaintiff's success in relation to the . . . goals of the lawsuit is a factor critical to the determination of the *size* of a reasonable fee, not to eligibility for a fee award at all." *Texas State Teachers*, 489 U.S. at 790 (second emphasis added).

This Court has emphasized that "the district court has discretion in determining the amount of a fee award" and, with its "superior understanding of the litigation," is best able to assess whether the "relief

obtained justified th[e] expenditure of attorney time" for which fees are sought. *Hensley*, 461 U.S. at 436-37 & n.11. In situations where the relief obtained is limited, district courts may, in the exercise of their equitable discretion, "identify specific hours that should be eliminated [from the lodestar] or . . . simply reduc[e] the award to account for the limited success." *Texas State Teachers*, 489 U.S. at 789-90; see also *Blanchard* v. *Bergeron*, 489 U.S. 87, 96 (1989).

This is not to say, of course, that the amount of damages that plaintiffs recover under civil rights or other federal fee-shifting statutes is the determinative, or even necessarily a weighty, factor for purposes of establishing a reasonable fee award. The importance of some federal rights cannot be measured in monetary terms, see, *e.g.*, *Carey*, 435 U.S. at 266, yet Congress made plain that fee awards should not be reduced simply "because the rights involved may be nonpecuniary in nature." Senate Report, *supra*, at 6, *reprinted in* 1976 U.S. Code Cong. & Admin. News at 5913. Accordingly, this Court correctly has rejected a strict rule of proportionality in assessing the amount of a fee award, see *City of Riverside* v. *Rivera*, 477 U.S. 561 (1986), and Congress has not seen fit to change the statute to provide otherwise.

On the other hand, depending upon the nature of the case and the relief sought, the amount of damages recovered may well be the most significant indication of the plaintiff's "degree" of success. As this Court has explained, "[a] reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." *Hensley*, 461 U.S. at 440; see also *Rivera*, 477 U.S. at 574 ("The amount of damages a plaintiff recovers

is certainly relevant to the amount of attorney's fees to be awarded under § 1988"). In the exercise of their sound discretion, and given their greater familiarity with the litigation, district courts are fully capable of undertaking such comparisons.[12]

Under this approach, there is no risk that courts' recognition of plaintiffs' status as "prevailing parties" necessarily will result in unwarranted awards of fees. By acknowledging that parties such as petitioners here have crossed the bare "statutory threshold" of being prevailing parties, courts still can account for any limitation in the parties' success in the calculation of the "reasonable fee," thereby carrying out Congress' intention that statutory fee awards be "adequate to attract competent counsel, but . . . not produce windfalls to attorneys." Senate Report, *supra*, at 6, *reprinted in* 1976 U.S. Code Cong. & Admin. News at 5913. Accordingly, concern about the magnitude of fee awards is no basis for imposing a flat prohibition, not found in the statute, on attorney's fees in cases involving only nominal damages. Instead, the courts can deal with the magnitude of the award directly by ensuring that the award is "reasonable" within the meaning of Section 1988.

---

[12] Unlike determining the "central issue" or "primary relief sought," which entails an " 'excruciating[ly]' " difficult inquiry into the plaintiff's mental state, assessing the degree of success in light of the entire litigation is a straightforward task that this Court has repeatedly entrusted to district courts. See, *e.g.*, *Hensley*, 461 U.S. at 440; *Blanchard*, 489 U.S. at 96; *Texas State Teachers*, 489 U.S. at 789-90.

CONCLUSION

For the reasons stated above, the ABA submits that the Civil Rights Attorney's Fees Awards Act of 1976 authorizes the award of reasonable attorney's fees in cases in which civil rights plaintiffs recover nominal damages.

Respectfully submitted,

TALBOT S. D'ALEMBERTE *
President
American Bar Association
ERIC B. SCHNURER
CARTER G. PHILLIPS
JOSEPH R. GUERRA
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-5215

Counsel for Amicus Curiae

* *Counsel of Record*

April 9, 1992